IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDA HARPER	:	CIVIL ACTION
	:	
v.	:	
	:	
COURT OF COMMON PLEAS	:	
OF PHILADELPHIA, et al.	:	NO. 99-4906

MEMORANDUM AND ORDER

BECHTLE, J. MAY , 2000

Presently before the court is defendants the Court of Common Pleas of Philadelphia County's and the Philadelphia Probation and Parole Department's (collectively "Defendants") converted motion for summary judgment and plaintiff Freda Harper's ("Plaintiff") response thereto. For the reasons set forth below, the court will grant the motion.

I. BACKGROUND

Plaintiff was a Probation Officer Trainee assigned to the Philadelphia Probation and Parole Department of the Court of Common Pleas of Philadelphia County.[1] Plaintiff was hired by Defendants in September 1991. Plaintiff alleges that on May 29, 1997, a number of Probation Officer Trainees were promoted to Probation Officer I, and that she was not among them. Plaintiff alleges that she was denied promotion because of her race and/or

[1] The Court of Common Pleas of Philadelphia County is one of the three courts within the First Judicial District. 42 Pa. Cons. Stat. Ann. §§ 901, 911, 1122, 1301, 1321. "All components of the judicial branch of the Pennsylvania government are state entities." Callahan v. City of Philadelphia, No.99-1816, 2000 WL 311128, at *6 (3d Cir. March 28, 2000).

age in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000(e) et seq., and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq..[2] Plaintiff filed a Complaint on October 14, 1999. On October 29, 1999, Defendants filed a motion to dismiss. Discovery ended on March 3, 2000 and by Order dated May 2, 2000, the court notified the parties that it would treat the motion to dismiss as a motion for summary judgment and allowed the parties the opportunity to submit additional materials.

II. LEGAL STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Id. In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving

[2] This court has jurisdiction over Plaintiff's claims because they arise under federal law. 28 U.S.C. § 1331.

party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (citation omitted).

III. DISCUSSION

Plaintiff asserts that she was denied a promotion because of race and/or age discrimination in violation of Title VII and the ADEA. (Compl. ¶¶ 16, 24-26.) Defendants contend that the Eleventh Amendment bars Plaintiff's ADEA claim and that her Title VII claim is barred by the statute of limitations. The court will address each argument separately.

A. ADEA Claim

In Kimel v. Florida Board of Regents, the Supreme Court held that Congress exceeded its power under § 5 of the Fourteenth Amendment when it abrogated the states' Eleventh Amendment immunity in ADEA cases, because the substantive requirements that the ADEA imposes on state and local governments are disproportionate to any constitutional conduct that conceivably could be targeted by the Act. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 650 (2000) (affirming dismissal of suits filed under ADEA against state employers).[3] Thus, because the ADEA

[3] The Supreme Court noted that, even though the ADEA does not validly abrogate the states' immunity to suits by private individuals, state employees are nonetheless protected by state age discrimination statutes under which they may recover damages. Kimel, 120 S. Ct. at 650.

does not validly abrogate the states' Eleventh Amendment immunity, the court will grant Defendants' motion as to Plaintiff's ADEA claim.

B. Discovery Rule and Equitable Tolling

Defendants contend that Plaintiff's Title VII claim is barred because Plaintiff failed to timely file a charge with the Equal Employment Opportunity Commission ("EEOC"). Plaintiff had 180 days from the last allegedly unlawful employment practice to file a charge of discrimination under the EEOC. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385 (3d Cir. 1994) (stating plaintiff had 180 days to file charge of discrimination with EEOC).[4] Plaintiff did not receive a promotion on May 29, 1997. Plaintiff filed her charge with the EEOC 245 days later, on January 30, 1998.

Plaintiff, however, asserts that the doctrine of equitable tolling should apply to toll the 180 day time period. In support of her assertion, Plaintiff states that in August 1997, she sent a letter to the Honorable John W. Herron, Administrative Judge of the First Judicial District of Pennsylvania, Court of Common

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[4] A plaintiff is required to file a complaint with the EEOC within 180 days of the occurrence of the alleged discriminatory act(s). 42 U.S.C. § 2000e-5(e)(1). However, where a plaintiff "has initially instituted proceedings with a State or local agency with authority to grant or seek relief from [an unlawful employment] practice . . . such charge shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated [its] proceedings . . . whichever is earlier." Id. Plaintiff did not file with a state or local agency in this case.

Pleas, asking for a further explanation as to why she was not promoted. (Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss at unnumbered p. 3.) Plaintiff contends that Judge Herron makes final decisions concerning promotions in the Philadelphia Probation and Parole Department. Id. Judge Herron replied to Plaintiff's letter on August 18, 1997, stating that he had not individually reviewed each of the promotions and that he had asked that records concerning Plaintiff's employment be reviewed as soon as possible. Id. Ex. B. Plaintiff contends that the 180 day period did not begin to run until she received Judge Herron's letter.[5]

Generally, the statute of limitations begins to run when the plaintiff's cause of action accrues. There are two related

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[5] In support of her assertion, Plaintiff cites Meyer v. Riegel Products Corporation, 720 F.2d 303 (3d Cir. 1983). In Meyer, the plaintiff alleged that he had been wrongfully discharged on the basis of his age. The court found that fact questions remained as to whether the statute of limitations should be equitably tolled where the plaintiff, several weeks after his dismissal, wrote a letter to his employer seeking to ascertain the reasons for his discharge. Meyer, 720 F.2d at 305. The employer responded with a letter stating that the plaintiff had been dismissed because of a pending reorganization of the corporation. Id. At approximately the same time the letter was written, the defendant hired a twenty-eight year old man to fill the plaintiff's former position. Id. The court stated that the employer's letter "could have caused [plaintiff] to temporarily defer filing." Id. at 307. The court also recognized the fact that the plaintiff did not know that the defendant had hired a younger man, and thus could not make out a prima facie case of age discrimination, until nearly six months after he learned that he would be discharged. Id. at 305-06. In contrast, in the instant case, Plaintiff knew that she did not receive a promotion on May 29, 1997 and, in her August 1997 letter to Judge Herron, Plaintiff wrote that she knew who had been promoted and that she suspected "discriminatory practices." (Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss at Ex. A & Compl. ¶¶ 19-24.)

doctrines that might extend the deadlines for Plaintiff to file a charge of discrimination: the "discovery rule," and the "equitable tolling doctrine." See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385-90 (3d Cir. 1994). The discovery rule delays accrual of the statute of limitations period until the plaintiff discovers that she has been injured. Id. at 1385. The equitable tolling doctrine stops the statute of limitations from running where the accrual date has passed and the statute of limitations is tolled in light of equitable considerations even though the plaintiff discovered she was injured. Id. at 1390.

Under the discovery rule, Plaintiff did not have to discover that her injury was based on discrimination, but need only be "aware of the existence of and source of an injury." Id. at 1386. Her claim accrued "upon awareness of actual injury, not upon awareness that th[e] injury constitute[d] a legal wrong." Id. Thus, Plaintiff's delay in bringing this action is not excused by the discovery rule. According to the Complaint, Plaintiff discovered her injury "[o]n or about May 29, 1997," when she learned that she had not received the promotion she sought. (Compl. ¶ 15.) The statute of limitations began running at that point. Plaintiff did not file the charge of discrimination with the EEOC until January 30, 1998, more than 180 days after the alleged act of discrimination and beyond the deadline established in 42 U.S.C. S 2000e-5(e). Thus, Plaintiff's allegations of discrimination are time-barred unless

the equitable tolling doctrine applies.

The equitable tolling doctrine provides that it "may be appropriate [to toll the limitations period:] (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1125-26 (3d Cir. 1997) (quoting Oshiver, 38 F.3d at 1387).

The pleadings contain no allegation or inference that Plaintiff in some extraordinary way was prevented from asserting her rights, or mistakenly asserted her rights in the wrong forum. Plaintiff's only colorable claim would be that Defendants actively misled her respecting her cause of action for a discriminatory failure to promote. To invoke equitable tolling, Plaintiff must show that "due to [Defendants'] deception, she could not, through the exercise of reasonable diligence, discover essential information bearing on her claim." Haines v. Township of Voorhees, No.Civ.A.96-3032, 1997 WL 714226, at *7 (D.N.J. Nov. 10, 1997); see New Castle County, 111 F.3d at 1126 (same); Oshiver, 38 F.3d at 1390 (same).

Thus, Plaintiff's non-compliance with the statutory limitations period is excusable only if "(1) the defendant actively misled the plaintiff respecting the reason for the [adverse employment action], and (2) this deception caused the

plaintiff's non-compliance with the limitations provision." Oshiver, 38 F.3d at 1389.[6]

In explaining this basis for equitable tolling, the Third Circuit has stated:

> where the plaintiff has been actively misled regarding the reason for [the adverse employment action], the equitable tolling doctrine provides the plaintiff with the full statutory limitations period, starting from the date the facts supporting the plaintiff's cause of action either become apparent to the plaintiff or should have become apparent to a person in the plaintiff's position with a reasonably prudent regard for his or her rights.

Id. at 1387.

To benefit from the equitable tolling doctrine, Plaintiff must establish that she could not have discovered the essential factual information bearing on her claim by the exercise of "reasonable diligence." New Castle County, 111 F. 3d at 1125-26 (stating that "excusable neglect" is "not sufficient to invoke equitable tolling) (citations omitted). The doctrine of equitable tolling requires that the plaintiff take "reasonable measures to uncover the existence of an injury." Haines, 1996 WL 714226 at *6; Oshiver, 38 F.3d at 1390; see Cada v. Baxter Healthcare Corp., 920 F. 2d 446, 452-53 (7th Cir. 1990) (stating that, for equitable tolling, plaintiff must show "that he could not by the exercise of reasonable diligence have discovered essential information bearing on his claim" and that "[i]n most

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[6] Equitable tolling is appropriate only to correct wrongdoing where a plaintiff was "deceived . . . into postponing the filing of a claim," "lulled . . . into inaction," or "actively misled." Oshiver, 38 F.3d at 1388-89, 1392.

cases in which equitable tolling is invoked, the statute of limitations has run before the plaintiff obtained information essential to deciding whether he had a claim. The pattern in the cases recognizes implicitly that the statute of limitations is not automatically delayed by the time it takes to obtain such information, since . . . that will usually be sometime after the claim arose. When . . . the necessary information is gathered after the claim arose but before the statute of limitations has run, the presumption should be that the plaintiff could bring suit within the statutory period and should have done so."). "The plaintiff who fails to exercise this reasonable diligence . . . lose[s] the benefit of" the equitable tolling doctrine. Oshiver, 38 F.3d at 1390.

In Oshiver, the plaintiff filed a charge of discrimination with the EEOC 440 days after she was terminated from a law firm with the explanation that the firm "did not have sufficient work to sustain her position." Oshiver, 38 F.3d at 1384. A year later, she learned that the firm hired a male attorney "shortly after her dismissal . . . to take over her duties." Id. The Court of Appeals found that there were issues of fact as to whether the plaintiff had been misled when she was told she was terminated because of lack of work; whether she was aware that she was replaced by a male employee, a "critical fact that would have alerted a reasonable person to the alleged unlawful discrimination;" and whether a person in her position with a reasonably prudent regard for her rights would have learned of

the allegedly discriminatory act. Id. at 1392. The court determined that, giving Oshiver the benefit of all reasonable inferences, the allegations were sufficient to raise the possibility of equitable tolling. Id. The court recognized that equitable tolling applied where facts were "concealed" from the plaintiff through the defendant's "wrongdoing." Id.

Thus, the "cases in which equitable tolling has been invoked have involved, unlike here, an employer's active deception of an employee concerning the reason for an employment action, which deception causes the employee to be lulled into foregoing prompt vindication of her rights." Haines, 1997 WL 714226 at *7; see Oshiver, 38 F.3d at 1388-89 (discussing cases). In the instant case, Plaintiff alleges that Defendants provided a non-discriminatory reason as to why she was not promoted, i.e., that she had a history of excessive sick leave. (Compl. ¶ 17.) However, Plaintiff does not allege or present any evidence that the facts were unknown to her. Unlike the plaintiff in Oshiver, Plaintiff does not allege that she did not learn of the alleged discrimination against her until after the statute of limitations had run. Whereas the plaintiff in Oshiver had alleged that she did not know that a male had been hired in her place, Plaintiff states that a younger, less qualified, Caucasian employee was promoted even though this employee had been warned about her excessive sick leave and Plaintiff had not been. (Compl. ¶¶ 19-23.) Likewise, Plaintiff's August 1997 letter to Judge Herron states that "I am aware that others who have been placed on

written sick alert have been granted their promotions. This to me suggests some discriminatory practices." (Pl.'s Mem. of Law in Opp'n to Def.'s Mot. to Dismiss at Ex. A.) Unlike the plaintiff in Oshiver, Plaintiff does not assert or present any evidence that she did not or could not know who had been promoted. Plaintiff does not contend or present any evidence that she was misled by Defendants' alleged misrepresentations. Plaintiff does not allege or present any evidence that the critical facts that would have alerted a reasonable person to the alleged unlawful conduct only became known to her after she received Judge Herron's letter. Thus, Plaintiff's allegations, the evidence presented, and all reasonable inferences that can be drawn therefrom, are insufficient to invoke equitable tolling.

C. Continuing Violation Theory

Plaintiff also asserts that because Defendants' alleged discriminatory conduct is "continuing in nature," her failure to file within 180 days does not bar her suit. (Pl.'s Mot. in Opp'n to Defs.' Mot. to Dismiss at unnumbered p. 4-5.) Plaintiff misconstrues the continuing violation theory.

The continuing violation theory "requires proof of the existence of a discriminatory policy and of its application to plaintiff." Courtney v. LaSalle Univ., 124 F.3d 499, 506 (3d Cir. 1997). The "continuing violation theory allows a plaintiff to pursue a Title VII claim for discriminatory conduct that began prior to the filing period if he can demonstrate that the act is part of an ongoing practice or pattern of discrimination of the

defendant." Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481 (3d Cir. 1997) (internal quotations and citations omitted).

Thus, under the continuing violation theory, a plaintiff may pursue a claim for discriminatory conduct that is time-barred if she can demonstrate that the act is part of an "ongoing practice or pattern of discrimination" by the defendant. West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir. 1995) (citations omitted). To establish that a claim falls within the continuing violation theory, the plaintiff must demonstrate that: (1) at least one discriminatory act occurred within the limitations period; and (2) the discriminatory conduct is more than the occurrence of isolated or sporadic acts of intentional discrimination; that is, the acts demonstrate a continuing pattern of discrimination. Id. at 754-55.

Plaintiff has failed to "show that at least one discriminatory act occurred" within the statutory period. Id. Under the continuing violation theory, "[t]he time for filing a charge runs from the most recent application of the policy to the plaintiff." Courtney, 124 F.3d at 506 (citations omitted). Plaintiff asserts that she was discriminated against on May 29, 1997 when she was not promoted. (Compl. ¶¶ 15-16.) Thus, the time for Plaintiff to file a charge began to run on May 29, 1997. Plaintiff filed her EEOC charge 245 days later, on January 30, 1998. Plaintiff has failed to allege any discriminatory act that took place in the 180 day period prior to January 30, 1998, when she filed her EEOC charge. (Compl. ¶¶ 13-14.)

The Complaint also asserts that "[p]rior to May 29, 1997, Defendants began a systematic pattern and practice" of discriminating on the basis of race. (Compl. ¶¶ 13-14.) However, besides alleging that Defendants failed to promote her, Plaintiff has failed to specify any other act of alleged discrimination. Fed. R. Civ. P. 56 (stating that "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."). Further, "[a] plaintiff may not rely in the continuing violation theory to advance claims about isolated instances of discrimination concluded in the past." Id. at 505. Rather, Plaintiff must "demonstrate a continuing pattern of discrimination." Rush, 113 F.3d at 481. Thus, the court finds that the continuing violation theory does not apply under the facts of this case.

IV. CONCLUSION

For the foregoing reasons, Defendants' converted motion for summary judgment will be granted.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDA HARPER	:	CIVIL ACTION
v.	:	
COURT OF COMMON PLEAS OF PHILADELPHIA, et al.	:	NO. 99-4906

ORDER

AND NOW, TO WIT, this day of May, 2000, upon consideration of defendants the Court of Common Pleas of Philadelphia County's and the Philadelphia Probation and Parole Department's (collectively "Defendants") converted motion for summary judgment and plaintiff Freda Harper's ("Plaintiff") response thereto, IT IS ORDERED that:

(1) Defendants' converted motion for summary judgment as to Plaintiff's claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq., is GRANTED.

(2) Defendants' converted motion for summary judgment as to Plaintiff's claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., is GRANTED.

(3) Judgment is entered in favor of defendants the Court of Common Pleas of Philadelphia County and the Philadelphia Probation and Parole Department and against plaintiff Freda Harper on all counts.

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LOUIS C. BECHTLE, J.